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## The Confusing Language of *McCulloch v. Maryland*: Did Marshall Really Know What He Was Doing (or Meant)?

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## **The Confusing Language of *McCulloch v. Maryland*:**

### **Did Marshall Really Know What He Was Doing (or Meant)?**

Sanford Levinson<sup>1</sup>

All legal “interpretation” involves confrontation with inherently indeterminate language. I have distinguished in my own work between what I call the Constitution of Settlement and the Constitution of Conversation. The former includes those aspects of the Constitution that do indeed seem devoid of interpretive challenge, such as the unfortunate assignment of two senators to each state or the specification of the terms of office of representatives, senators, and presidents. I am quite happy to concede that “two,” “four,” and “six” have determinate meaning, though my concession is not based on a fancy theory of linguistics. It is, rather, a recognition that only in the most unusual, perhaps even bizarre, circumstances would anyone raise serious questions about their meaning. Around the seminar table, contemplating the highest of high theories, one can “problematize” all language; texts are never truly self-interpreting. They could, after all, be written in a secret code to which we must apply a key. But, pragmatically, we all “know” what “two,” “four,” or “six” means, and we are even willing to concede without further discussion that one measures the age requirements for public officials against the solar rather than lunar calendar. We can debate the wisdom of all of these constitutional

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1. The original version of this essay was prepared for the wonderful gathering organized by David Schwartz that took place in November at the University of Wisconsin Law School in Madison. Mark Killenbeck, the author of an indispensable book on *McCulloch*, served as a co-organizer and arranged for the publication of many of the papers in the *Arkansas Law Review*, for which I am very grateful. Needless to say, this revised version benefitted from comments received at the Madison gathering, as well as from comments given to me by Mark Graber and Jack Balkin.

requirements, as I am wont to do, but there is, practically speaking, no serious debate about their meaning.

This is, obviously, in contrast with the parts of the Constitution that the legal academy actually chooses to teach (and obsess) about. Our students are not introduced to the Constitution via the Veto Clause and its requirement for two-thirds of each House to join in an override, or Article V's requirement that three-quarters of the states agree to ratify a given constitutional amendment. A few of us may denounce both as giving way too much power to entrenched minorities—and thus exemplifying what I have criticized as “our undemocratic Constitution.”<sup>2</sup> Or, if we are devotees of Bruce Ackerman (as I am), we might note the way that the adoption of the Fourteenth Amendment is in some tension with the assumptions underlying Article V regarding the freedom that the states might be thought to have to reject a proffered proposal.<sup>3</sup> Still, I am confident that most of us spend almost all of our professional time, especially in the classroom, with materials that generate genuine controversies about constitutional meaning as measured by the frequency with which they are litigated. Interpretive approaches to the “majestic generalities”<sup>4</sup> of the Fourteenth Amendment take precedence over any serious discussion of the actual provenance of the Amendment in terms of the ostensible requirements of Article V.<sup>5</sup>

What I want to do in this essay is to explore one such interpretive controversy, which involves one of the truly key words in the entire theological and political lexicon — “sovereignty.”<sup>6</sup> I increasingly realize that my entire introductory course in constitutional law could be described as an extended meditation on the term. And it is no coincidence at all that in 2018-19, I taught both a reading course at Harvard during the fall semester and then a full-scale seminar at the University of Texas

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2. *See generally* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

3. *See* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 111 (2000).

4. *Fay v. New York*, 332 U.S. 261, 282 (1947).

5. *But see* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 348-51 (7<sup>th</sup> ed. 2018), which, as in previous editions, does at least acknowledge the presence of the Ackermanian question about the legitimacy of the Fourteenth Amendment as an Article V amendment.

6. On the theological importance of “sovereignty,” *see generally* JEAN BETHKE ELSHTAIN, SOVEREIGNTY: GOD, STATE, AND SELF (2008).

Law School in the spring on the many controversies generated by taking seriously the notion of “popular sovereignty” (especially when combined with the prospect of Wilsonian “self-determination”). No idea has been more important—or, possibly, generated more mischief—over the past three centuries.<sup>7</sup>

Given our general topic, and my own obsession with the case, I shall, of course, be especially addressing *McCulloch*.<sup>8</sup> But it is crucial to begin with one prior case, which is left totally unmentioned by John Marshall; indeed, he cites no cases whatsoever in what can only be described as his truly monumental “state paper” on the American constitutional order that goes well beyond deciding the case at hand.<sup>9</sup> Ignoring precedent is certainly understandable in “cases of first impression,” where, by definition, there are no relevant cases to draw on as potentially authoritative. But, to put it mildly, the status of states as “sovereign” was scarcely unexamined by 1819. It was the central issue of the first important case decided in 1793 by the United States Supreme Court, *Chisholm v. Georgia*.<sup>10</sup> Unfortunately, it has basically dropped out, assuming it was ever part of, the pedagogical canon of constitutional law; perhaps because of our tendency in the legal academy to treat John Marshall as if he were the first (instead of the fourth) Chief Justice and therefore to ignore anything the Court did prior to his arrival. This is a fundamental error.

Anyone who takes seriously the notion of “sovereignty”—and the role the term plays in American political and legal discourse—must confront *Chisholm*. I would say, incidentally, that this is especially true for ostensible originalists, who should explain how it is that the 1793 Court—which included among its members by all accounts one of the three most important members first of the Philadelphia Convention and then the Pennsylvania ratifying convention, James Wilson, as well as one of the three authors of *The Federalist*, Chief Justice John Jay—

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7. See Sanford Levinson, *The Continuing Specter of Popular Sovereignty and National Self-Determination in an Age of Political Uncertainty*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 651 (Mark A. Graber, Sanford Levinson & Mark Tushnet eds., 2018).

8. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

9. See *id.*

10. *Chisholm v. Georgia*, 2 U.S. 419 (1793).

could have been so mistaken about the original public meaning of what appears to the naïve as the plain text of the Constitution.

In any event, *Chisholm* involved the desire of the executor of an estate in South Carolina to sue Georgia in federal court for a debt clearly owed by the state with regard to purchases during the Revolutionary War (or, as I prefer to call it, the Secession from the British Empire).<sup>11</sup> The state claimed “sovereign immunity” from even having to answer the claim filed against it.<sup>12</sup> The Court then ruled by a vote of four to one, with James Iredell of North Carolina writing in splendid isolation, that Georgia had no such immunity.<sup>13</sup> Two of the opinions, by Justices Blair and Cushing, rested on what we would today call “textual argument.” Thus Cushing writes as follows:

The judicial power . . . is expressly extended to “controversies between a State and citizens of another State.” . . . The case, then, seems clearly to fall within the letter of the Constitution. It may be suggested that it could not be intended to subject a State to be a Defendant, because it would effect the sovereignty of States. If that be the case, what shall we do with the immediate preceding clause; “controversies between two or more States,” where a State must of necessity be Defendant? If it was not the intent, in the very next clause also, that a State might be made Defendant, why was it so expressed as naturally to lead to and comprehend that idea? Why was not an exception made, if one was intended?<sup>14</sup>

For anyone who professes to take text seriously—think, for example, of the late Justice Scalia or the present Justice Gorsuch—this would seem to be as close to a knock-down argument as is imaginable. As textualists, including myself in my “Constitution of Settlement” mode, are prone to ask, “what part of ‘controversies between a State and citizens of another State’ do you not understand?” But, as Justice Iredell, himself no second-rate intellect, suggested, states might claim to stand in the shoes

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11. *Id.* at 420.

12. *Id.* at 419.

13. *Id.* at 420.

14. *Id.* at 467 (opinion of Cushing, J.).

of the British Monarch, who certainly enjoyed sovereign immunity.<sup>15</sup> Moreover, one can even point to various statements made by proponents of the Constitution, trying to wrest the votes of wavering delegates justifiably concerned that the new Constitution created a “consolidated government” that left states as pitiful hulks of their formerly sovereign selves at the time of the 1776 secession from the Empire or even prior to ratification of the new Constitution.<sup>16</sup>

So it is necessary (and proper) to turn to the truly remarkable opinions of the first Chief Justice, John Jay, and then, perhaps even more notably, of James Wilson, who in addition to his practical importance at two conventions in Philadelphia, also wrote the first great American treatise on law.<sup>17</sup> I shall quote at length from these opinions, in part reflecting my increasing frustration by the actual paucity of time spent analyzing given cases—including, importantly, *McCulloch*—even as we profess to take cases seriously. But to take cases truly seriously requires devotion of due time to their complexity, not to focus simply on favorite paragraphs that turn out to be the equivalent of soundbites. And it may well be that spending such time is far more likely to reveal the inherent complexities and even contradictions within a given opinion than to provide a confident “rationale” that hapless students can write down in a brief of the case. I usually tell my students that briefing cases is a waste of time; or, to put it another way, if *McCulloch* could truly be “briefed,” then why in the world should it be included in its entirety, as it is, in the casebook that I co-edit or even the relatively lengthy excerpts that are found in most casebooks? There is a reason that I have devoted a twelve-hour reading course at Harvard and the first half of the semester in a course at the University of Texas to reading aloud Marshall’s opinion in its entirety and stopping to discuss the important questions (often begged) that can be found within almost literally every sentence.

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15. *Chisholm*, 2 U.S. at 437 (opinion of Iredell, J.).

16. 30 THE PAPERS OF THOMAS JEFFERSON 553 (Barbara B. Oberg et al. eds., 2003) (text of Kentucky Resolutions drafted anonymously by Jefferson).

17. Wilson’s lectures on law, together with other of his important writings, are available in a well-produced, affordable two-volume edition published by the Liberty Fund, edited by the late Kermit Hall, JAMES WILSON, COLLECTED WORKS OF JAMES WILSON (Kermit L. Hall ed., 2007).

The same could be done with *Chisholm*, and indeed practically any of the truly significant cases within the canon.

“In determining the sense in which Georgia is a sovereign State,” Jay writes, we must advert back “to the political situation we were in . . . prior to the Revolution.”<sup>18</sup> No doubt at that time, “[a]ll the people of this country were then, subjects of the King of Great Britain, and owed allegiance to him; and all the civil authority then existing or exercised here, flowed from the head of the British Empire,” as sovereign.<sup>19</sup> Indeed, at least through the fateful execution of King Charles in 1649, monarchs claimed to have derived their own sovereignty from Divine sovereignty.<sup>20</sup> Recall, in this context, Romans 13:1 and its proclamation that magistrates are chosen by God and are, presumably, entitled to the deference the faithful grant to the Ruler of the Universe.<sup>21</sup> Divine Right theories did not survive the Seventeenth Century, of course. Not only did Cromwellites execute King Charles I in 1649; the Glorious Revolution of 1688, which sent James II into exile and replaced him, by Parliamentary choice, with William and Mary of the Netherlands, made it clear that the basis of monarchical legitimacy was now rooted in some theory, however evanescent, of popular (or at least parliamentary) acceptance.<sup>22</sup> What replaced monarchical sovereignty, save for ceremonial references to the monarch as “sovereign,” was the sovereignty of the British parliament.<sup>23</sup> That was, however, scarcely acceptable to the American secessionists, who were almost pathetically critical of King George III for his failure to veto what the colonists claimed were overreaching laws passed by the Parliament.<sup>24</sup>

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18. *Chisholm*, 2 U.S. at 470 (opinion of Jay, C.J.).

19. *Id.*

20. See generally J. NEVILLE FIGGIS, *THE THEORY OF THE DIVINE RIGHT OF KINGS* (2d ed. 1922).

21. As stated in the King James Version well known to English Protestants, “Let every soul be subject unto the higher powers. For there is no power but of God: the powers that be are ordained of God.” *Romans* 13:1 (King James).

22. See G. Edward White, 1 *LAW IN AMERICAN HISTORY: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR* 115 (2012) (Glorious Revolution “established the House of Common in Parliament as the principal law making body. . . The theory of sovereignty animating the arrangement was that although formal sovereignty remained vested in the monarch for some purposes, primary practical sovereignty, in the form of lawmaking power, resided in Parliament.”).

23. *Id.*

24. See ERIC NELSON, *THE ROYALIST REVOLUTION: MONARCHY AND THE AMERICAN FOUNDING* 64-65 (2014).

They did not truly assimilate the reality that the royal veto power had been, as a practical matter, eliminated, last exercised by Queen Anne in 1709 and to disappear thereafter.<sup>25</sup> And no one should believe that the colonists desired token representation, even by elected representatives, in a Parliament that would continue to view itself as possessing the power to pass whatever tax legislation it wished to apply to America.<sup>26</sup> What they wanted was *independence* from the tentacles of parliamentary sovereignty, not token participation in its decisionmaking.<sup>27</sup>

According to Jay, the Declaration “found the people already united for general purposes.”<sup>28</sup> This is, after all, what allowed the Declaration to open with the altogether debatable assertion that the colonists were “one people” asserting their right to leave the Empire. Jay had also asserted this proposition as one of the co-authors of *The Federalist* advocating replacement of the Articles of Confederation by the Constitution.<sup>29</sup> “From the crown of Great Britain, the sovereignty of their country,” that is, the United States, or in some texts, the “united States,” “passed to the people of it.”<sup>30</sup> It should be noted, there is nothing innocent in the use of “it” rather than “them.” Jay anticipated the all-important change, following the carnage of 1861-65, from referring to the “United States” in the plural to instead adopting the singular. Jay’s is a precursor of the most nationalist version of Marshall’s later opinion by asserting that “the people . . . . continued to consider themselves, in a national point of view, as one people; and they continued without interruption to manage their national concerns accordingly.”<sup>31</sup> They manifested this by making “a confederation of the States, the basis of a general government.”<sup>32</sup> However, “[e]xperience disappointed the expectations they had formed from it.”<sup>33</sup> Several of the Framers, including Randolph and Hamilton, denounced the Confederation government as

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25. *Id.* at 16; F.P. LOCK, EDMUND BURKE, VOLUME II: 1784-1797 67 (1998).

26. Nelson, *supra* note 24, at 37.

27. *See id.* at 109.

28. *Chisholm*, 2 U.S. at 470 (opinion of Jay, C.J.).

29. *See* SANFORD LEVINSON, AN ARGUMENT OPEN TO ALL: READING THE FEDERALIST IN THE 21<sup>ST</sup> CENTURY 12-17 (2015) (discussing THE FEDERALIST NO. 2 in which John Jay enunciated the theme that Americans were “one people”).

30. *Chisholm*, 2 U.S. at 470 (opinion of Jay, C.J.).

31. *Id.*

32. *Id.*

33. *Id.*

“imbecilic,”<sup>34</sup> the rectification of which licensed the extraordinary freedom displayed by the Convention with regard to the seeming constraints imposed either by the Congressional authorization for the Convention in the first place or, even more dramatically, by the rigid rules of amendment presented by Article XIII of the Articles of Confederation. In any event, Jay tells us, “the people, in their collective and national capacity, established the present Constitution.”<sup>35</sup>

It is at this point that we reach what might be termed the “money paragraph” in Jay’s opinion:

It is remarkable that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, “We the people of the United States, do ordain and establish this Constitution.” Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform. Every State Constitution is a compact made by and between the citizens of a State to govern themselves in a certain manner; and the Constitution of the United States is likewise a compact made by the people of the United States to govern themselves as to general objects in a certain manner. By this great compact however, many prerogatives were transferred to the national Government, such as those of making war and peace, contracting alliances, coining money, etc. etc.<sup>36</sup>

Could John Marshall possibly have put it any better? (That he did not, as a matter of fact, is a primary topic of this paper.)

What we might even wish to describe as American exceptionalism pervades Jay’s opinion inasmuch as he offers America as a vivid contrast to the “feudal principles” that continue to animate “the sovereignties in Europe, and particularly in England.”<sup>37</sup> There the Prince is considered “as the sovereign, and the people as his subjects; it regards his person as the object

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34. See, e.g., THE FEDERALIST NO. 15 (Alexander Hamilton).

35. *Chisholm*, 2 U.S. at 470 (opinion of Jay, C.J.).

36. *Id.* at 470-71.

37. *Id.*

of allegiance, and excludes the idea of his being on an equal footing with a subject, either in a Court of Justice or elsewhere.”<sup>38</sup> It therefore easily follows that “such a sovereign could not be amenable to a Court of Justice, or subjected to judicial controul and actual constraint.”<sup>39</sup> There is a further problem, of course, which is that the monarch possesses “all the Executive powers,” so that “the judgment of the Courts would, in fact, be only monitory, not mandatory to him, and a capacity to be advised, is a distinct thing from a capacity to be sued.”<sup>40</sup> However, Jay assures us, “No such ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African slaves among us may be so called) and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty.”<sup>41</sup>

What is “sovereignty”? It is, says Jay, “the right to govern.”<sup>42</sup> More accurately, perhaps, for Americans it is the right to establish the terms of governance even as representatives engage in the actual quotidian acts of governance. In Europe, where “princes” are sovereign, “the sovereign actually administers the Government; here [in America], never in a single instance.”<sup>43</sup> Instead, “our Governors are the agents of the people,” “who are the actual sovereigns.”<sup>44</sup> As Richard Tuck argues in his important book *The Sleeping Sovereign*, Jay fully adopts an all-important distinction between *sovereignty* and *government*.<sup>45</sup> It is the people who establish the government, which may or may not have limited powers.<sup>46</sup> Hobbes powerfully argued that a sovereign people would in fact choose to adopt what most of us would describe as a tyrannical Leviathan state as the sole way of escaping the otherwise “nasty, brutish, and short” life

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38. *Id.*

39. *Id.*

40. *Chisholm*, 2 U.S. at 471 (opinion of Jay, C.J.).

41. *Id.* at 471-72.

42. *Id.*

43. *Id.*

44. *Id.*

45. See generally RICHARD TUCK, *THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY* (2015).

46. *Chisholm*, 2 U.S. at 472 (opinion of Jay, C.J.).

presented in an insufficiently governed natural state.<sup>47</sup> It may be that such a government possesses, as a practical matter, the powers that we associate with “sovereignty.” But as an analytical matter, we should continue to distinguish between the “real sovereign,” even if (s)he should be sleeping, and the government that is created by the sovereign. After all, at least under some circumstances, it is possible that the sleeping sovereign might arise from bed and invoke all of the necessarily retained powers of sovereignty set out, for example, in the Declaration of Independence.

What this all adds up to is the clear liability of a state within the Union to be sued by a citizen of another state inasmuch as *no* government can claim itself to be “sovereign.” The clear text rests on a profound political theory, which indeed distinguishes the New Order being established by Americans from the “feudal” one being left blessedly behind. Jay offers the equivalent of a syllogism:

It is agreed, that one free citizen may sue another; the obvious dictates of justice, and the purposes of society demanding it. It is agreed, that one free citizen may sue any number on whom process can be conveniently executed; nay, in certain cases one citizen may sue forty thousand; for where a corporation is sued, all the members of it are actually sued, though not personally, sued.

The state is simply a peculiar kind of corporation, and no less amenable to suit simply because it is called Georgia. Like Cushing, he notes that “one State may sue another State in this Court”<sup>48</sup> without fatal insult to what Justice Kennedy would much later dubiously insist is the “dignity” instantiated in being a State within the Union.<sup>49</sup> So, Jay quite cleverly suggests that “[i]t is not therefore to an appearance in this Court that the objection points.”<sup>50</sup> Instead, Georgia claims to be insulted by the *lese*

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47. THOMAS HOBBS, LEVIATHAN 115 (Lerner Publ’g Grp. 2018) (1651).

48. *Id.* at 473.

49. *Alden v. Maine*, 527 U.S. 706, 715 (1999).

50. *Chisholm*, 2 U.S. at 473 (opinion of Jay, C.J.).

*majeste* of being sued by a South Carolina citizen.<sup>51</sup> That would be tenable if Georgia had, as Iredell seems to suggest, succeeded to the status of George III.<sup>52</sup> But it did not. As Gerald Ford would put it in 1974, “Here the [P]eople rule,”<sup>53</sup> which means that states can be sued as well as sue one another (and, just as importantly, act as plaintiffs against individual citizens). To rule otherwise

would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is, to ensure justice to all:—[t]o the few against the many, as well as to the many against the few. It would be strange, indeed, that the joint and equal sovereigns of this country, should, in the very Constitution by which they professed to establish justice, so far deviate from the plain path of equality and impartiality, as to give to the collective citizens of one State, a right of suing individual citizens of another State, and yet deny to those citizens a right of suing them.<sup>54</sup>

Jay concludes his opinion with a tantalizing observation and question: Does his argument extend to the ability of a citizen to sue the United States itself?<sup>55</sup> He concedes that it is “fair reasoning” from his overall argument that that should be the case.<sup>56</sup> However, he explains that “the same principles of candour which urge [him] to mention this objection also urge [him] to suggest an important difference between the two cases.”<sup>57</sup> The brute fact is that although federal courts might be expected to be supported by the national executive with regard to judgments against states, no same expectation can necessarily be enjoyed with regard to “cases of actions against . . . the United States; . . . [because] there is no power which the Courts can call to their aid. From this distinction important conclusions are deducible, and

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51. *Id.* (“It is not therefore to an appearance in this Court that the objection points. To what does it point? It points to an appearance at the suit of one or more citizens.”).

52. *Id.* at 446 (opinion of Iredell, J.).

53. President Gerald R. Ford, Remarks at Swearing in Ceremony at The White House (Aug. 9, 1974) (transcript available in the Ford Library Museum), <https://www.fordlibrarymuseum.gov/library/speeches/740001.asp>.

54. *Chisholm*, 2 U.S. at 477 (opinion of Jay, C.J.).

55. *See id.*

56. *Id.* at 478.

57. *Id.*

they place the case of a State, and the case of the United States, in very different points of view.”<sup>58</sup>

Perhaps one might regard this cautionary note as Bickelian prudentialism *avant la lettre*.<sup>59</sup> After all, the concern about what might be termed an “unsympathetic executive” might be said to be the fundamental concern that will explain *Marbury v. Madison*<sup>60</sup> only a decade later, when the “passive virtues” of what many have perceived as Marshall’s capitulation to political reality and Jeffersonian power predominated to prevent William Marbury from receiving the commission to which Marshall clearly believed he was legally entitled.<sup>61</sup> Perhaps in the future, Jay suggests, “the State of society [will be] so far improved, and the science of Government advanced to such a degree of perfection, as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens.”<sup>62</sup> But in 1793 that is simply a dream. That the United States itself may be able to escape its just legal deserts does not, however, compel a similar conclusion with regard to Georgia.

Should we not already be convinced, James Wilson certainly provides added reinforcement, especially rhetorically. He describes the case as being one “of uncommon magnitude” owing to the fact that “[o]ne of the parties to it is a State:—certainly respectable, claiming to be sovereign.”<sup>63</sup> But a “claim” is not the equivalent of the fact asserted, and Wilson devotes his opinion to demolishing it.<sup>64</sup>

He begins by noting that “[t]o the Constitution of the United States, the term SOVEREIGN, is totally unknown . . . . They might have announced themselves “SOVEREIGN” people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration.”<sup>65</sup> One might wonder why that

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58. *Id.*

59. See Alexander Bickel, *Forward: The Passive Virtues*, 75 HARV. L. REV. 40, 47 (1961) (explaining the techniques by which the United States Supreme Court avoids deciding certain especially politically troublesome constitutional issues in order to preserve its own institutional power).

60. See generally 5 U.S. 137 (1803).

61. Bickel, *supra* note 59, at 49-51.

62. *Chisholm*, 2 U.S. at 478 (opinion of Jay, C.J.).

63. *Id.* at 453 (opinion of Wilson, J.).

64. See *id.* at 453-66.

65. *Id.* at 454.

would be “ostentatious,”<sup>66</sup> as distinguished from saying simply that it was totally unnecessary given the opening of the Preamble. In any case, for Wilson, the state should “be considered as subordinate to the People . . . . The only reason, I believe, why a free man is bound by human laws, is, that he binds himself.”<sup>67</sup>

Randy Barnett, one of the relatively few other analysts who has paid such careful attention to Wilson’s opinion, uses this as the basis for what I regard as a near-anarchic doctrine of individual sovereignty.<sup>68</sup> But, at the very least, we might agree that Wilson’s theory of popular sovereignty makes untenable any theory of state sovereignty, whether in reference to Georgia or, indeed, to the United States. Contrary to what Justice Kennedy will later assert, “dignity” is possessed by free individuals, not by artificial states.<sup>69</sup> Thus, Wilson writes, “[i]f the dignity of each singly is undiminished; the dignity of all jointly must be unimpaired. A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, willfully refuses to discharge it: The latter is amenable to a Court of Justice: Upon general principles of right, shall the former when summoned to answer the fair demands of its creditor, be permitted, proteus-like, to assume a new appearance, and to insult him and justice, by declaring ‘I am a Sovereign state?’ Surely not.”<sup>70</sup> There may be a prudential, “realist” response to Wilson, but is there a truly principled one?

“In one sense,” writes Wilson, “the term ‘*sovereign*’ has for its correlative, ‘subject. . .’” just as, we often argue today, “rights” imply “duties.”<sup>71</sup> But, he insists that this sense of “sovereignty”

66. *Id.*

67. *Chisholm*, 2 U.S. at 455-56 (opinion of Wilson, J.).

68. Randy Barnett, *We the People: Each and Every One*, 123 YALE L.J. 2576, 2597-99 (2014).

69. *Chisholm*, 2 U.S. at 455-56 (opinion of Wilson, J.) (“By a State I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person. It has its affairs and its interests . . . its rights . . . its obligations. It may acquire property distinct from that of its members . . . incur debts to be discharged out of the public stock, not out of the private fortunes of individuals. It may be bound by contracts; [and] for damages arising from the breach of those contracts. In all our contemplations, however, concerning this feigned and artificial person, we should never forget, that, in truth and nature, those, who think and speak, and act, are men.”).

70. *Id.* at 456.

71. *Id.*

“can receive no application” in the United States” for “[u]nder th[e] Constitution there are *citizens*, but no *subjects*.”<sup>72</sup> What about states? Does that make a difference? “[S]ome writers” assert that “every State, which governs itself without any dependence on another power, is a sovereign State.”<sup>73</sup> However, Wilson is truly committed to the constitutional guarantee, in the constitutional text, that each State possess a Republican Form of Government.<sup>74</sup> So what does *that* mean?

[M]y short definition of such a Government is,—one constructed on this principle, —that the Supreme Power resides in the body of the people. As a Judge of this Court, I know, and can decide upon the knowledge, that the citizens of *Georgia*, when they acted upon the large scale of the *Union*, as a part of the “People of the *United States*,” did *not* surrender the Supreme or sovereign Power to that State; but, *as to the purposes of the Union*, retained it to themselves. *As to the purposes of the Union*, therefore, *Georgia is NOT a sovereign State*. If the Judicial decision of this case forms *one of those purposes*; the *allegation*, that *Georgia* is a sovereign State, is unsupported by the *fact*.<sup>75</sup>

Wilson goes on to cite the plain words of Article III, as well as the purposes of the Constitution set out in the Preamble, and demonstrates that both parts of the Constitution support rejecting any claim of sovereign immunity by Georgia.<sup>76</sup>

As is well known, the Eleventh Amendment overruled *Chisholm*.<sup>77</sup> But, as John Manning has well argued, the language of that Amendment is remarkably limited to the specifics of the case itself, i.e., the suit by an out-of-state citizen against a state.<sup>78</sup> It in no way adopts any general declaration (or even presumption)

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72. *Id.*

73. RANDY E. BARNETT & JOSH BLACKMAN, CONSTITUTIONAL LAW: CASES IN CONTEXT 84 (3d ed. 2018).

74. *Chisholm*, 2 U.S. at 457 (opinion of Wilson, J.).

75. *Id.*

76. *Id.* at 474-75.

77. See, e.g., *Hans v. Louisiana*, 134 U.S. 1, 11 (1890); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1667 (2004).

78. See Manning, *supra* note 77, at 1680-83.

of state sovereignty.<sup>79</sup> We are also invited to ask whether the Amendment overruled a clearly incorrect decision, as appears to be believed by the current majority of the Supreme Court,<sup>80</sup> or instead, changed the meaning of the Constitution itself by overriding what was clearly a correct reading of the 1787 Constitution.<sup>81</sup> As you might suspect, I would argue that the latter is clearly the case. Or, let me put it this way: If Georgia *is* a sovereign state in any truly serious sense, then we should recognize, among other things, the potential legitimacy of its secession, on behalf of the “one people” of Georgia, from the Union in 1861, just as the “one people” of the United States seceded from the British Empire in 1776. “Sovereignty” is not a term that should be bandied about as if its meaning can be easily cabined.

So, at long last we turn to the object of our gathering, what I believe is the single most important, and perhaps mysterious, opinion in our entire canon: *McCulloch v. Maryland*.<sup>82</sup> I begin, as is doubly appropriate, with the very first sentence, which begins “In this case now to be determined, [Maryland], a **sovereign** State . . . .”<sup>83</sup> I have for many years been perplexed why Marshall, an unusually skilled rhetorician, chose to begin the opinion this way. After all, if one takes a traditional view of what sovereignty entails—i.e., the power of ruling and *not* being ruled in return<sup>84</sup>—then the obvious message of the case, particularly its second part, dealing with the power to tax the Bank of the United States, is that Maryland in no serious sense is a “sovereign state” (just as so-called “Kentucky colonels” like Harlan Sanders are in fact not “colonels” in the U.S. military). It may be the case that Maryland was *once* a sovereign state, upon, say, gaining independence via the Treaty of Paris in 1783 that recognized the existence of the thirteen independent American states. We do continue to call former office-holders by their title, so that at present there are Presidents Carter, Clinton, Bush, and Obama in addition to President Donald J. Trump. But, for better or worse,

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79. *See id.* at 1682–83.

80. *See id.* at 1728 n.246.

81. *See id.* at 1739–41.

82. 17 U.S. 316 (1819).

83. *Id.* at 400 (emphasis added). I will generally place any reference to “sovereign” or “sovereignty” in boldface.

84. *See Sovereignty*, BLACK’S LAW DICTIONARY (10th ed. 2014).

only the last in this series can exercise any of the Article II powers assigned to presidents or other powers delegated by Congress. The other former presidents know not to confuse the honorific use of a former title with an acknowledgment of even an iota of legal power. So was Marshall simply using the term “sovereign” with regard to Maryland as an honorific reminder of past glory but not otherwise to be taken as indicative of any genuine legal power?

One might well view the power to tax (like the power to wage war) as the *sine qua non* of sovereignty. Not insignificantly, after all, it was the King’s alleged power to tax in the absence of parliamentary acquiescence that triggered the English Revolution in 1642 and the similar allegation of British parliamentary power to levy stamp and tea taxes, among others, on the colonists in America that triggered the secession and creation of the United States of America.<sup>85</sup> Any look at *McCulloch* reveals that Maryland has no power to wage war or, importantly, even to enter into treaties with foreign countries, and the case stands for the proposition that the power to tax is limited as well.<sup>86</sup> This is obvious from a simple reading of the text, especially Article I, Section 10, concerning the possibility of imposing tariffs or inspections fees. But it is either Marshall’s genius or audacity to imply a further prohibition on the taxing power of the purportedly “sovereign” state, drawn not from the text of the Constitution, but instead from what he identifies as the “texture” of the document.<sup>87</sup> In fact, as Marshall is well aware, *Federalist* 32 contains a long discussion of the concurrent powers of both the states and the national government to engage in taxation, with the concomitant suggestion that the inevitable clashes that would arise would be settled politically and, most definitely, not by reference to ostensibly legalistic constraints contained in the Constitution.<sup>88</sup> Marshall essentially declares that the *Federalist* is irrelevant.<sup>89</sup> Again, one can wonder about the actual reality of “originalism” in explaining American constitutional development.

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85. See, e.g., Christopher Hibbert, *CAVALIERS AND ROUNDHEADS: THE ENGLISH CIVIL WAR 1642-1649* (1994).

86. *McCulloch*, 17 U.S. at 316.

87. *Id.* at 426.

88. THE FEDERALIST No. 32 (Alexander Hamilton).

89. See *McCulloch*, 17 U.S. at 433–35.

Moreover, the absence of any reference to *Chisholm* is especially perplexing. Is it sufficient to say either that it was decided a full quarter century prior to the 1819 decision considering the Bank (and Maryland's attempt to tax it)? Or is Marshall implicitly interpreting the Eleventh Amendment, which is never mentioned in the slightest, given its utter formal irrelevance to the case, as fundamentally overruling the opinions of both Jay and Wilson and not merely the particular holding that a state can be sued by a citizen of another state? But why would he do that?

It was suggested in the Madison gathering that the first sentence might have been written as it was in order to assure the vote of a possibly recalcitrant colleague. There is no evidence for this. More to the point, it would be quite stunning if any member of the Court genuinely doubted the constitutionality of the Bank, given that Madison himself had signed the renewal in 1816. And, as already suggested, the important declaration in Part II, that Maryland's tax was unconstitutional, is at complete odds with the description of the State as "sovereign."<sup>90</sup> A justice who demanded the inclusion of the adjective in sentence one would be hard-pressed to explain acquiescence to the way that Marshall almost eviscerates the ostensible concession in the course of the opinion.

Not surprisingly, the next string of appearances of the term occurs in paragraphs 7-11, which deal with what might be called the ontology of the Union. That is, what is the basis of the Union? How was it created? We get one distinct creation story in both Jay's and Wilson's opinions. By 1798, Madison and Jefferson, although authors of the Declaration of Independence, have offered, in the Virginia and Kentucky Resolutions, respectively, very different creation myths in which state sovereignty can indeed be thought to be central.<sup>91</sup> And, for that matter, one can

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90. See *supra* text accompanying note 89.

91. For the texts of these seminal documents see, <https://billofrightsinstitute.org/founding-documents/primary-source-documents/virginia-and-kentucky-resolutions/>. For a brilliant analysis of some of the crucial differences between Madison and Jefferson, particularly with regard to the notion of "nullification," see Jonathan Gienapp, *How to Maintain a Constitution: The Virginia and Kentucky Resolutions and James Madison's Struggle with the Problem of Constitutional Maintenance*, in SANFORD LEVINSON, ED., NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT 53 (2016).

see precursors of the Kentucky and Virginia Resolutions in *Federalist* 39, where Publius (Madison) is attempting to square the circle of describing the nature of the American republic.<sup>92</sup> Not surprisingly, Marshall notes that:

the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of **sovereign** and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly **sovereign**; and must be exercised in subordination to the States, who alone possess supreme dominion.<sup>93</sup>

The gauntlet clearly being thrown down by the (sovereign?) State of Maryland, Marshall immediately indicates that “[i]t would be difficult to sustain this proposition.”<sup>94</sup> Whatever role the States might have played in selecting the delegates who attended the Philadelphia Convention is now irrelevant.<sup>95</sup> After all, “the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it.”<sup>96</sup> They had no authority to “adopt” the Constitution; in no way did the Convention view itself as what would come to be called a “constituent power.”<sup>97</sup> Instead, and crucially, the recommendation adopted on September 17, 1787, “was reported to the then existing Congress of the United States, with a request that it might ‘be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification.’”<sup>98</sup> For Marshall, this is equivalent to submitting the text “to the people,” the presumptive sovereigns.<sup>99</sup> He then dances around the issue of whether they were “the people” of the entire United States, as insisted upon by Jay especially, or “the people” of their particular

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92. THE FEDERALIST NO. 39 (James Madison).

93. *McCulloch*, 17 U.S. at 402 (emphasis added).

94. *Id.* at 403.

95. *See id.*

96. *Id.*

97. *Id.*

98. *McCulloch*, 17 U.S. at 403.

99. *Id.*

states, who retained that identity throughout.<sup>100</sup> “It is true,” Marshall admits, that “they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass.”<sup>101</sup> Of course one might suggest that Jay and Wilson were precisely such “dreamers,” at least conceptually, for what else can “one people” mean if not some version of a “common mass.” However, Marshall writes, and the key question is whether this is a fundamental concession or something else, “Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.”<sup>102</sup>

It is “[f]rom these Conventions” that “the constitution derives its whole authority. The government proceeds directly from the people,” who have the capacity to ““ordain[] and establish[]” a new political order “in the name of the people.”<sup>103</sup> Although “[t]he assent of the States, in their **sovereign** capacity,” might have been inferred through their ability to call a Convention, and even agreeing to submit the proposed Constitution “to the people,” Marshall emphasizes that “the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negated, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State **sovereignties**.”<sup>104</sup> At the moment they were “bound,” it seems fair to suggest, they were no longer sovereign in any truly meaningful sense. They might have possessed certain retained powers, of course, but those were the result of recognition by what might be termed the “true sovereign,” i.e., the people who “ordained and established” the Constitution that created the new national government and announced formal supremacy over the formerly sovereign state governments. From this perspective, there is *one* sovereign—“We the People”—and two levels of

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100. *Id.* at 403-05.

101. *Id.*

102. *Id.*

103. *McCulloch*, 17 U.S. at 403.

104. *Id.* at 404 (emphasis added).

government who have only such powers either assigned or recognized by the sovereign people.

“It has been said,” Marshall writes, and, of course, one wonders about who exactly has said this, “that the people had already surrendered all their powers to the State **sovereignities**, and had nothing more to give.”<sup>105</sup> He is not impressed.

But, surely, the question whether they may resume and modify the powers granted to government does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the States. The powers delegated to the State **sovereignities** were to be exercised by themselves, not by a distinct and independent **sovereignty**, created by themselves. To the formation of a league, such as was the confederation, the State **sovereignities** were certainly competent. But when, “in order to form a more perfect union,” it was deemed necessary to change this alliance into an effective government, possessing great and **sovereign** powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all. The government of the Union, then . . . is emphatically, and truly, a government of the people. In form and in substance, it emanates from them. Its powers are granted by them . . . . It is the government of all; its powers are delegated by all.<sup>106</sup>

Although one hesitates to describe this paragraph as a model of clarity, it does appear that the constituent power is placed in a collective (and ontologically singular) people who create the “constituted powers” that are placed in both national and state governments. For better or, I believe, for worse, Marshall is not done with his display of what might be called “sovereignty talk.” The further instances are as follows:

... [T]he power of creating a corporation, is one appertaining to **sovereignty**, and is not expressly conferred on Congress. This is true. But all legislative powers

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105. *Id.* (emphasis added).

106. *Id.* at 404-05 (emphasis added).

appertain to **sovereignty** . . . . The creation of a corporation, it is said, appertains to **sovereignty**. This is admitted. But to what portion of **sovereignty** does it appertain. . . ? In America, the powers of **sovereignty** are divided between the government of the Union, and those of the States. They are each **sovereign**, with respect to the objects committed to it, and neither **sovereign**, with respect to the objects committed to the other . . . . [H]ad the people conferred on the general government the power contained in the constitution, and on the States the whole residuum of power, would it have been asserted, that the government of the Union was not **sovereign**, with respect to those objects which were entrusted to it . . . ? If this could not have been asserted, we cannot well comprehend the process of reasoning which maintains, that a power appertaining to **sovereignty** cannot be connected with that vast portion of it which is granted to the general government . . . .<sup>107</sup> The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to **sovereignty**, and may be exercised whenever the **sovereign** has a right to act, as incidentally to his constitutional powers. It is a means for carrying into execution all **sovereign** powers. . . .<sup>108</sup>

That the power of taxing [the bank] by the States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like **sovereign** power of every other description, is intrusted to the discretion of those who use it. But the very terms of this argument admit, that the **sovereignty** of the State, in the article of taxation itself, is subordinate to, and may be controlled by the constitution of the United States.<sup>109</sup>

If we measure the power of taxation residing in a State, by the extent of **sovereignty** which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the

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107. *Id.* at 409-11 (emphasis added).

108. *McCulloch*, 17 U.S. at 418 (emphasis added).

109. *Id.* at 427 (emphasis added).

power may be applied . . . . We are relieved, as we ought to be, from clashing **sovereignty** . . . .<sup>110</sup>

So it is at this point that I can ask the question that genuinely mystifies me: What, if anything, is gained by the use of the term “sovereignty” in the paragraphs immediately above, that would not be present if instead we simply used the word “government” perhaps accompanied by the adjective “effective” or, to use a fine 18<sup>th</sup>-century term, “efficacious”? As Marshall himself insists, one should read the Constitution to provide for just such a government, given the dismal experience under the Articles of Confederation.<sup>111</sup> One can even read the Constitution, should one wish, to provide for certain protections for the sub-national governments whose functional importance is recognized by the sovereign People. But one can say all of this without ever once using the word “sovereignty” to refer to the powers of government, as against those appertaining to the *pouvoir constituant*.

I have been teaching *McCulloch* now for some forty years. I once thought I truly understood what Marshall was saying. But now I find myself wondering. It is not, incidentally, that I think there is a singular meaning awaiting us if only we can crack the code contained within the language that Marshall uses. Indeed, I was critical several years ago of a long essay that our host, David Schwartz, had published that I thought had made just such an assertion.<sup>112</sup> I am delighted that his really fine forthcoming book on the case appears to recant, *not* by asserting a different “one true meaning,” but rather by suggesting that, perhaps like the epic poem the opinion in some sense really is, it resists reduction to any one message.<sup>113</sup> Indeed, it appears to invite various deconstructionist moves, insofar as one seeming assertion, such as the ontological status of Maryland as “a sovereign State,” that are so clearly undercut by depriving it of the basic right to tax as it wishes, subject, as suggested in Federalist 32, only to *political*

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110. *Id.* at 429-30 (emphasis added).

111. *Id.* at 406-07.

112. See generally David S. Schwartz, *Misreading McCulloch v. Maryland*, 18 U. PA. J. CONST. L. 1 (2015).

113. DAVID SCHWARTZ, *THE SPIRIT OF THE CONSTITUTION: JOHN MARSHALL AND THE 200-YEAR ODYSSEY OF MCCULLOCH V. MARYLAND* (forthcoming August 2019).

resistance, but not at all to the *legalized* invalidation that is the message contained in Part II of the decision.<sup>114</sup>

One could make the same observations about the status of the national government as possessing only “limited powers.” Well, yes, he does say this, but then one has to confront the (possible) meanings of paragraph 38, not to mention the meanings he assigns the words “necessary and proper.” And then there is paragraph 42, in which we are assured, with whatever degree of sincerity we might assign, that the Court will always stand ready to monitor merely pretextual use of what would otherwise be within the assigned powers.

*McCulloch* helps to structure much of the basic language we use to analyze constitutional questions. Unfortunately, it bequeathed to us a completely muddled and perhaps incomprehensible notion of “sovereignty” that Marshall insists on using, not, of course, for the first time. Mark Killenbeck discusses some other uses of the term by Marshall. In *Fletcher v. Peck*,<sup>115</sup> for example, where the Court for the first time invalidated a state statute on constitutional grounds, Marshall observed that Georgia could have rescinded the land grants in question (which were procured by massive fraud and a corrupt state legislature) were the state “a single sovereign power.”<sup>116</sup> But, of course, it was not, and the attempted rescission fell victim to either the Contract Clause or a more “general” reading of the Constitution to impose limits drawn from the theory of republican government on the State.<sup>117</sup> Similarly, another case, *Sturges* (or *Sturgis*)<sup>118</sup> *v. Crowninshield*,<sup>119</sup> decided almost at the very same time as *McCulloch*, saw Marshall invalidating the New York State bankruptcy law that would have discharged an antecedent debt.<sup>120</sup> Although New York was “in most respects, sovereign,”<sup>121</sup> that did not extend to what Marshall viewed as the violation of the Contract Clause by allowing a party, via a state bankruptcy provision, to evade complying with the contractual

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114. *Id.*

115. *Fletcher v. Peck*, 10 U.S. 87 (1810).

116. *Id.* at 136.

117. *See id.* at 135-37.

118. *See* Mark Killenbeck, *M'ulloch in Context* (forthcoming 2019).

119. *Sturges v. Crowninshield*, 17 U.S. 122 (1819).

120. *Id.* at 208.

121. *Id.* at 192-93.

obligation.<sup>122</sup> If one takes Marshall's language seriously, one has not only degrees of sovereignty, but also the continued suggestion that it is New York that is sovereign rather than, importantly, "We the People" who construct the governments within the overall polity and determine what powers they actually enjoy.

One of the most serious problems faced by legal academicians is that we are the prisoners of the language used, for whatever reasons, by the Supreme Court. With regard to the hash the Court has made of the term "diversity" concerning the use of race in governmental decisions, I have suggested that the Court should simply be analogized to Simon in the children's game "Simon Says."<sup>123</sup> Even less charitably, one can perhaps view the Court as having taken on the role of Humpty Dumpty in the freedom it sometimes asserts to offer idiosyncratic definitions of terms that pervade important works of political and social theory about which the Court professes, probably all too accurately, to complete ignorance. Law students are rarely given explicit training in the rich materials of political theory relevant to law. And there is no reason at all to believe that those particular lawyers who end up on the judiciary, including the Supreme Court, make up for any such deficiencies in their education, however otherwise talented some of them undoubtedly are.

In fact, with regard to Marshall, one can wonder, even after conceding his obvious brilliance as a practicing lawyer, how deep his formal education was, especially when compared with Wilson, for example. Reviewing a recent biography of Marshall,<sup>124</sup> Judge Jed Rakoff notes that Marshall, unlike, for example, Jefferson, "was largely self-taught and had no more than one year of formal schooling."<sup>125</sup> Although he did enroll in the law curriculum at the College of William and Mary after his distinguished service in the Revolutionary War, "he lasted only six weeks before dropping out."<sup>126</sup> Rakoff concedes that these

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122. *Id.* at 208.

123. See Sanford Levinson, *Diversity*, 2 U. PENN. J. CON. L. 573, 578 (2000), reprinted in Sanford Levinson, *WRESTLING WITH DIVERSITY* 11 (2003).

124. Joel Richard Paul, *WITHOUT PRECEDENT: CHIEF JUSTICE JOHN MARSHALL AND HIS TIMES* (2018).

125. See Jed S. Rakoff, *Hail to the Chief*, N.Y. REV. BOOKS (Nov. 22, 2018), <https://www.nybooks.com/articles/2018/11/22/john-marshall-hail-chief/> [<https://perma.cc/U2AX-R7J6>].

126. *Id.*

“limited foundations” nonetheless allowed Marshall to build “a command of the law,” coupled with a skill in advocacy, “that quickly made him a leader of the Virginia Bar.”<sup>127</sup> One can readily agree while, at the same time, believing that perhaps someone better trained would have been more careful in his almost casual use of the term “sovereign.” After all, we know that Marshall wrote Joseph Story in 1821, only two years after *McCulloch*, that the “tendency of things” in his home state of Virginia “verges rapidly to the destruction of the government and the re-establishment of a league of sovereign states.”<sup>128</sup> Did he not recognize that his own questionable use of the loaded language of “sovereignty” might have contributed to this tendency?

Justice Kagan wrote with disarming candor in *Puerto Rico v. Sanchez Valle*,<sup>129</sup> which deals with the status of Puerto Rico in the context of the “dual sovereignty” theory of criminal liability that allows punishment for the same overt acts by both state and national levels of government, that “[t]ruth be told, however, ‘sovereignty’ in this context does not bear its ordinary meaning . . . . In short, the inquiry (despite its label) does not probe whether a government possesses the usual attributes, or acts in the common manner, of a sovereign entity.”<sup>130</sup> Lawyers must in effect forget what some of them might in fact have learned from the study of political theory and instead embrace the specialized—and confusing—language of the law, especially as declared by the Supreme Court. Similarly, Justice Thomas in turn had undoubtedly been correct in the earlier case of *United States v. Lara*<sup>131</sup> when describing the language used by the Court (and therefore by legal academics in thrall to such language) to describe the status of American Indian tribes as “schizophrenic.”<sup>132</sup> As he writes, “[i]t is quite arguably the

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127. *Id.*

128. *Id.*; Marshall to Story, quoted in William E. Dodd, *Chief Justice Marshall and Virginia, 1813-1821*, 12 AM. HIST. REV. 777 (1904); see also Matt Steilen, A VIRGINIA PERSPECTIVE ON *MCCULLOCH* 26 (2018) (unpublished manuscript, on file with The Arkansas Law Review). Incidentally, Professor Steilen took exception to my suggestion that Marshall might have been inadequately educated, at least with regard to the complexities of “sovereign” and “sovereignty.”

129. 136 S. Ct. 1863 (2016)

130. *Id.* at 1870.

131. 541 U.S. 193 (2004).

132. *Id.* at 219.

essence of sovereignty not to exist merely at the whim of an external government.”<sup>133</sup> He therefore concludes by plaintively suggesting that “until we begin to analyze these questions honestly and rigorously, the confusion that I have identified will continue to haunt our cases.”<sup>134</sup>

A central meta-issue is what would constitute an “honest and rigorous” analysis of a term like “sovereignty.” Would it draw on the literature of trained political theorists (some of whom have suggested that the term should in fact be banished from discourse given the conflicting definitions proffered by different theorists) or treated as part of the “autonomous” language of the law, which need not concern itself with the professional discourses of others.<sup>135</sup> One might suggest that the “haunting” alluded to by Justice Thomas owes a great deal to Marshall’s altogether confusing use of language in *McCulloch* and, of course, his later opinions in what has come to be known as the “Marshall trilogy” of cases dealing with the rights of American Indians, where Marshall wrestles with the degree to which Indian tribes that wish, like the American colonists vis-à-vis the British, to be independent, retain measures of “sovereignty” even as they have become “domestic dependent nations” under the power of the decidedly alien United States government.<sup>136</sup> It should not be surprising that American Indian tribes and First Peoples of Canada are resistant to the desiccated notion of “sovereignty”

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133. *Id.* at 218.

134. *Id.* at 226.

135. *See*, in this context, Chief Justice Roberts’s opinion in *Nat’l Fed’n of Ind. Bus. v. Sibelius*, 567 U.S. 519, 555 (2012), where he almost contemptuously dismisses the rich philosophical literature on the act-omission distinction as mere “metaphysics” of no interest to the practicing lawyer. His musings in the second part of the decision, dealing with the conditions placed upon states should they wish to continue enrollment in the existing Medicaid programs, pay equally little attention to the philosophical literature on the meaning of “coercion.” *See id.* at 582-87. One could, of course, make a similar point with regard to the Justices’ use of historical materials in their assertions about, say, “original meanings.” *See generally* Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995).

136. *See* *Johnson v. M’Intosh*, 21 U.S. 543 (1823) (legitimizing conquest of Indian lands basically on principle that might makes legal right); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (denying foreign statehood status to Cherokee Nation as a requisite to invoking original jurisdiction between the U.S. Supreme Court to claim Georgia’s violation of Cherokee’s protected sovereign rights); *Worcester v. Georgia*, 31 U.S. 515 (1832) (resisting Georgia’s, as distinguished from the national government’s, claim to jurisdiction over Cherokee territory).

imposed by their conquerors. A quite stunning collection of paintings by a Canadian First Nations artist, Lawrence Paul Yuxweluptun, collected under the title *Unceded Territories*, includes one painting entitled “Guardian Spirits on the Land: Ceremony of Sovereignty,” and another one, entitled “An Indian Game (Juggling Books)” that includes references to books on “Indian Country” and “Nation to Nation: Aboriginal Sovereignty and the Future of Canada.”<sup>137</sup>

It is a standard observation within literary theory that what explains the staying power of classics within the canon is that they are subject to multiple interpretations. New theses can still be written about *Hamlet* or *King Lear*. Are we really confident we know whether God or Satan is the true “hero” of *Paradise Lost*? How should we assess Starbuck’s conduct as First Mate on the ill-fated Pequod in relation to Ahab’s obsessive search for Moby Dick? And so on. Similarly, what accounts for the continuing fascination of *McCulloch* is that the conversation about what in the world it “really means” and stands for will never end, not least because it raises questions that are absolutely central to the project of the American republic but are never definitively answered within the four corners of the proffered opinion. Whether this is a comfort, either to us or to our students to whom we “introduce” the case, may be another matter.

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137. See LAWRENCE PAUL YUXWELUPTUN: UNCEDED TERRITORIES 76, 81 (Karen Duffek & Tania Willard, eds., 2016).